

**Miller v Barry**

2007 NY Slip Op 32669(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0011346/2002

Judge: Robert W. Doyle

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**ORDERED** that the motion (# 005) by defendant Roland Barry for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied; and it is further

**ORDERED** that the motion (# 006) by defendant C. N. Messina for summary judgment dismissing the complaint against him is withdrawn in accordance with the correspondence of defendant Messina’s counsel, dated August 15, 2007, indicating that the action has been discontinued as against defendant Messina, only; and it is further

**ORDERED** that the cross motion (# 007) by defendants Philip Cutlip and Mary Phillips for summary judgment dismissing the complaint against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Dawn Miller, as a result of a chain-reaction, rear-end motor vehicle collision which occurred on the westbound lanes of Route 347 in the Town of Smithtown, Suffolk County, New York, on September 19, 2000. At this point, Route 347 consists of three westbound through lanes and one left turning lane. The following facts are undisputed. There were five vehicles involved in the accident. The lead vehicle was the vehicle owned and operated by defendant C. N. Messina; behind it was the vehicle owned by defendant Mary Phillips and operated by defendant Philip Cutlip; behind it were plaintiff’s vehicle and the vehicle owned and operated by defendant Douglas Field; and last in line was the vehicle owned and operated by defendant Roland Barry.

Defendant Roland Barry now moves for summary judgment in his favor dismissing the complaint against him on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Barry submits, *inter alia*, the pleadings; a bill of particulars; the medical record of St. Catherine of Siena Medical Center; various health insurance claim forms; the medical record of North Shore Neurological Consultants, P.C.; the medical report dated September 22, 2000 of plaintiff’s treating neurologist, Dr. Richard Pearl, based on an examination of plaintiff on September 20, 2000; the medical report dated October 4, 2000 of Dr. Richard Pearl based on an examination of plaintiff on October 2, 2000; the medical report dated July 19, 2001 of plaintiff’s treating physician, Dr. Lawrence Zweibel, based on an examination of plaintiff on September 22, 2000; the electroencephalograph report dated October 3, 2000 of Dr. Richard Pearl concerning plaintiff’s brain, taken on September 25, 2000; the CT scan report of Dr. Robin Cunningham, taken on October 10, 2000; and the affirmed report dated June 1, 2005 of his examining orthopedist, Dr. Vartkes Khachadurian, based on an examination of plaintiff on May 20, 2005.

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including a bulging disc at L4-L5; lumbosacral and cervical spine sprain; lumbosacral and cervical radiculopathy; concussion; post concussion syndrome; headaches; blurred vision; and dizziness. In addition, plaintiff claims that she was confined to bed for approximately two weeks and home for approximately seven months.

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or

member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendant Barry failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see, *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). On May 20, 2005, approximately four years and eight months after the subject accident, defendant Barry's examining orthopedist, Dr. Khachadurian, examined plaintiff, using certain orthopedic and neurological tests and reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine. Dr. Khachadurian found that plaintiff had normal range of motion in her lumbar spine and that the Straight Leg Raising test was negative or normal. Although Dr. Khachadurian merely stated that "[plaintiff] is able to flex forward to touch the chin to the chest" and found that there was no spasm in plaintiff's cervical spine and that she had normal range of motion in her cervical spine, he failed to specify the degree of range of motion in forward flexion of plaintiff's cervical spine (see, *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2006]). Moreover, Dr. Khachadurian also failed to set forth the objective tests that were performed to support his conclusion that plaintiff did not suffer from any limitation of the range of motion in her cervical spine (see, *Vazquez v Basso*, 27 AD3d 728, 815 NYS2d 626 [2006]; *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2005]; *Nembhard v Delatorre*, *supra*). In addition, after an eye examination of plaintiff, including a glaucoma test, Dr. Zweibel opined that plaintiff had a concussion with no pathological findings noted and needed no treatment. Dr. Pearl's electroencephalograph report and Dr. Cunningham's CT scan report indicate no abnormalities of plaintiff's brain.

Thus, defendant Barry failed to establish, *prima facie*, his entitlement to judgment as a matter of law. Accordingly, his motion for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see, Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2005]).

Defendants Philip Cutlip and Mary Phillips now cross-move for summary judgment dismissing the complaint against them, asserting that they bear no liability for plaintiff's accident. In support, the aforementioned defendants submit, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff and defendants Cutlip and Barry.

At his examination before trial, defendant Cutlip testified to the effect that he had been traveling in the left "through" lane of the westbound of Route 347 and, when he came to a complete stop for "ten seconds" because an unidentified vehicle in front of him was stopped, he observed that the Barry vehicle hit the Field vehicle directly behind him. In turn, the Field vehicle was propelled into the rear of his vehicle. Approximately 15 to 20 seconds after the impact with his vehicle, he also observed that two more impacts, one of which the Messina vehicle was involved in, occurred in the center lane.

At her deposition, plaintiff testified to the effect that she was traveling westbound in the left lane of Route 347 at the speed of 40 or 45 miles per hour when she saw the Barry vehicle for the first time in her left sideview mirror. Plaintiff testified that, at the time, "[the Barry vehicle] was in between both lanes [and] he was going into the [left] turning lane but he still hadn't gotten all the way over." While plaintiff "just continued going," she felt an impact to the "left back corner" of her vehicle. At the time of the impact, there was no vehicle "in front of [her] in that left westbound lane." As a result of the first impact, plaintiff lost control of her vehicle, "spun maybe like 180 [degrees]" and struck the Messina vehicle which was completely stopped in the left-hand turning lane.

At his deposition, defendant Barry testified to the effect that, while he was traveling westbound in the left "thru" lane of Route 347 at the speed of 40 miles per hour, plaintiff's vehicle proceeding at a high rate of speed in the center lane passed his vehicle and suddenly cut him off. Plaintiff's vehicle struck the right front of the Barry vehicle, which was pushed to the left. Defendant Barry testified that, as a result of the impact, his vehicle "slid and hit" the Field vehicle, which was "ahead [of him] to the left" and was stopped. In turn, the Field vehicle hit the rear of the Cutlip vehicle in front of it. At the time of the first impact, there was no vehicle "ahead of [defendant Barry] in that left [thru] lane." Defendant Barry observed that, after the first impact with his vehicle, plaintiff's vehicle spun around and hit the Messina vehicle on the side of it, which was stopped in the first position of the left "turning" lane. At the time of the accident, it was raining and the roads were wet. Defendant Barry testified that both the impact between the Field vehicle and the Cutlip vehicle and the impact between plaintiff's vehicle and the Messina vehicle "happened simultaneously."

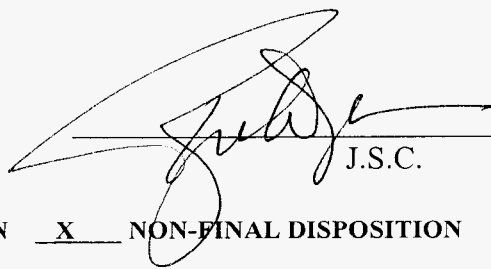
It is well settled that a *prima facie* case of liability is created when the operator of the moving vehicle rear-ends a stopped vehicle and that a duty of explanation is imposed on the operator of the moving vehicle to excuse the collision by providing a non negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or some other reasonable cause (*see, Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2005]; *Thoman v Rivera*, 16

AD3d 667, 792 NYS2d 558 [2005]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [1999]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (*Russ v Investech Sec.*, 6 AD3d 602, 775 NYS2d 867 [2004]; *Reid v Courtesy Bus Co.*, 234 AD2d 531, 651 NYS2d 612 [1996]). It is also well settled that a driver of a motor vehicle who is approaching another motor vehicle from the rear is bound to maintain a safe rate of speed and has a duty to keep control over his vehicle, as well as to exercise reasonable care to avoid colliding with the other vehicle (*Chapel v Meyer*, 306 AD2d 235, 762 NYS2d 95 [2003]; *Power v Hupart*, *supra*; see also, Vehicle and Traffic Law §1129 [a]).

Here, the deposition testimony of plaintiff and defendants Cutlip and Barry conflicted with each other as to the happening of the accident. Moreover, there are several issues of fact as to which vehicle was located in the left "thru" lane or in the left "turning" lane; which vehicle caused the first collision; and whether the Cutlip vehicle was stopped in the left "thru" lane or in the left "turning" lane. Under these circumstances, there is a question of fact as to whether the action of defendants Cutlip and Phillips contributed to any injuries sustained by plaintiff (*Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [1998]). Thus, defendants Cutlip and Phillips have failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law.

Accordingly, the motion (# 005) by defendant Roland Barry for summary judgment on the issue of serious injury and the cross motion (# 007) by defendants Philip Cutlip and Mary Phillips for summary judgment on the issue of liability are denied.

Dated:     AUG 23 2007    

  
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J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION